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Supreme Court, U.S.
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No. 98-545

In The Supreme Court of the United States

OCTOBER TERM, 1997

FLUOR DANIEL (NPOSR), INC.,
a Delaware corporation,

Petitioner,

v.

DAVID G. SEWARD,

Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Wyoming

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

DONN J. McCALL
Counsel of Record
Attorney for Petitioner
Brown, Drew, Massey & Sullivan
Casper Business Center
Suite 800
123 West First Street
Casper, Wyoming 82601
Telephone No. (307) 234-1000

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTION PRESENTED

Whether the issue of Due Process was timely raised and preserved in the district court and the Supreme Court of Wyoming.

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Petitioner, Fluor Daniel (NPOSR), Inc., a Delaware corporation, respectfully submits this Reply to Brief in Opposition in support of its petition for a writ of certiorari to the Supreme Court of Wyoming.

ARGUMENT

BECAUSE THE ISSUE OF DUE PROCESS WAS TIMELY RAISED BEFORE BOTH THE DISTRICT COURT AND THE SUPREME COURT OF WYOMING BY APPEALING TO FUNDAMENTAL PROCEDURAL FAIRNESS, THE ISSUE WAS PROPERLY PRESERVED, AND THE UNITED STATES SUPREME COURT HAS JURISDICTION.

Respondent, David Seward (Seward), contends that this Court should not issue a writ of certiorari because the due process issue was not properly preserved below. This contention is incorrect. Fluor Daniel (NPOSR), Inc. (Fluor Daniel) has consistently argued the issue of procedural fairness throughout the course of this litigation. The only issue in this case has always been simple fairness. Is it fair to exercise governmental power to award a default judgment of more than half a million dollars where the defendant has no meaningful opportunity to be heard or to present its defenses?

Under the traditional rule of this Court, if the parties and courts were aware of the issue and litigated it, then it is preserved even if the lower court did not base its decision on the issue. *United States v. Williams*, 504 U.S. 36, 40-45, 112 S. Ct. 1735, 118 L.Ed.2d 352 (1992). In the case at bar, the Due Process issue was preserved in the district court, where Fluor Daniel argued: "Relief from a default judgment is essentially a matter of fairness." *Memorandum in Support of Defendant's Motion to Set Aside Entry of Default Judgment Pursuant to Wyoming Rules of Civil Procedure 55(c) and 60(b)*, App. 4.7 (Nov. 5, 1996).

The fairness issue also was preserved in the Supreme Court of Wyoming where Fluor Daniel again argued: "Relief from a default judgment is a matter of fairness. Fair-

ness demands relief from a default judgment of $562,489.00, where the amount of the judgment was based upon blatant misrepresentations of fact." *Appellant's Brief*, App. 5.8 (Feb. 28, 1997). Fluor Daniel also argued that "Seward's judgment was unfairly obtained." *Appellant's Reply Brief*, App. 6.4 (Mar. 20, 1997). When Fluor Daniel argued to the Supreme Court of Wyoming in its original briefs that fairness demands the default judgment be set aside, it preserved the Due Process issue.

The fairness issue was again raised by Fluor Daniel in its petition for rehearing: "Due Process and Public Policy Considerations Require that Rehearing be Granted and the Default Judgment Entered in this Case be Set Aside." *Brief of Appellant in Support of Petition for Rehearing*, Appendix J, 37a (Apr. 27, 1998). Later in the brief, the issue was phrased: "The More Liberal Federal Standard Establishing 'Excusable Neglect' Should be Applied by this Court Based upon Public Policy and Due Process Considerations under the United States Constitution." *Id.* at 42a.[1]

The Supreme Court of Wyoming chose not to address the fairness issue, but did acknowledge "a temptation to review the damage award because of the amount awarded." *Fluor Daniel (NPOSR), Inc. v. Seward*, 956 P.2d 1131, 1136 (Wyo. 1998); Appendix B, 13a. And the Supreme Court of Wyoming ruled that the trial court's decision was not "arbitrary or capricious." *Id.* In denying rehearing, the Supreme Court of Wyoming again failed to address the fairness issue. *Order Denying Petition for Rehearing*, Appendix A (May 5, 1998).

The touchstone of procedural due process is protection of the individual against arbitrary action of government and comprehends fundamental procedural fairness. *County*

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[1] Contrary to the contention made by Seward at page 14 of his Brief in Opposition, the Supreme Court of Wyoming will grant a petition for rehearing on a constitutional issue not raised below or in the original appeal if "the public interest is involved". *Madden v. Wilde, State Examiner*, 48 Wyo. 372, 377-78, 49 P.2d 637 (1935); *see also Steffey v. City of Casper*, 358 P.2d 951 (Wyo. 1961).

of Sacramento v. Lewis, ___ U.S. ___, 118 S. Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998). Where life, liberty or property is at stake, one has a right to a fair procedure. This Court has stated that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L.Ed. 942 (1955). Due Process emphasizes fairness between the State and the individual dealing with the State. *Evitts v. Lucey*, 469 U.S. 387, 405, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985). And a state appellate process must comport with the Due Process Clause. *Evitts*, 469 U.S. at 401.

The principles of fairness fundamental to our conception of due process go to the very core of our system of government. Without this element of fairness, our judicial system would find itself bereft of the legitimacy and public acceptance it needs to perform its function:

> The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Hovey v. Elliott, 167 U.S. 409, 413-14, 17 S. Ct. 841, 42 L.Ed. 215 (1897).

Even though this Court has never directed the courts of this nation to look at Due Process principles when considering default judgments, many judges intuitively realize that defaults should be set aside where fairness so commands. And where trial courts deny motions to set aside default judgments, they will often be reversed. *See, e.g., Bieganek v. Taylor*, 801 F.2d 879 (7th Cir. 1986); *Traguth v. Zuck*, 710 F.2d 90 (2d Cir. 1983); *Oceanic Trading Corp. v. Vessel Di-*

ana, 423 F.2d 1 (2d Cir. 1970); *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969); *Menier v. United States*, 405 F.2d 245 (5th Cir. 1968); *Wilver v. Fisher*, 387 F.2d 66 (10th Cir. 1967); *Meeker v. Rizley*, 324 F.2d 269 (10th Cir. 1963); *Provident Security Life Insurance Co. v. Gorsuch*, 323 F.2d 839 (9th Cir. 1963), *cert. den.*, 376 U.S. 950, 84 S. Ct. 966, 11 L.Ed.2d 970 (1964); *Rooks v. American Brass Company*, 263 F.2d 166 (6th Cir. 1959); *Williams v. Blitz*, 226 F.2d 463 (4th Cir. 1955); *Barber v. Turberville*, 218 F.2d 34 (D.C. Cir. 1954); *Bridoux v. Eastern Air Lines, Inc.*, 214 F.2d 207 (D.C. Cir. 1954), *cert. den.*, 348 U.S. 821, 75 S. Ct. 33, 99 L.Ed. 647 (1954); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242 (3d Cir. 1951). "The setting aside of (a default) judgment should be tested by the principle of fundamental fairness." *Eastman Kodak Company v. Guasti*, 386 N.E.2d 291, 295 (Ill.App. 1979), *quoting Mieszkowski v. Norville*, 209 N.E.2d 358, 362 (1965).

This Court views the sufficiency of notice in the constitutional sense as grounded in the realities of the case before it:

> In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted."

Greene v. Lindsey, 456 U.S. 444, 451, 102 S. Ct. 1874, 72 L.Ed.2d 249 (1982), *quoting North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S. Ct. 491, 69 L.Ed. 953 (1925). This sensitivity to practical considerations is reflected in widespread judicial reluctance to permit default judgments where large sums of money are claimed. *See, e.g., Swink v. City of Pagedale*, 810 F.2d 791, 792 n.2 (8th Cir. 1987); *Rooks v. American Brass Company*, 263 F.2d at 169; *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d at 245; *Wendt v. Pratt*, 154 F.R.D. 229, 230 (D. Minn. 1994); *Phillips v. Weiner*, 103 F.R.D. 177, 179 (D. Me. 1984); *Horn v. Intelectron Corp.*, 294 F.Supp. 1153, 1155 (S.D.N.Y. 1968);

Eisler v. Stritzler, 45 F.R.D. 27, 28 (D.P.R. 1968); *Gamble v. Pope & Talbot, Inc.*, 191 F.Supp. 763, 764 (E.D.Pa. 1961).

In determining compliance with due process fairness, this Court has looked at whether the means of serving process fails to afford actual notice. *Greene*, 456 U.S. at 451, n. 4. Although the entity, Fluor Daniel, did receive nominal notice of this lawsuit, the record reveals that no individual in the control group, no individual with the authority to respond, ever received actual notice. To enter a default a judgment without any opportunity to be heard under these circumstances (where there is no actual notice) is fundamentally unfair and violates the Due Process protection of the Fourteenth Amendment to the United States Constitution.

In *Ellington v. Milne*, 14 F.R.D. 241 (E.D.N.C. 1953), a federal judge vacated a default judgment entered against a corporation when neither the legal department nor any officer of the corporation had actual knowledge that the summons had issued until it was found in storage files located in the corporation's basement nearly a year after the default. Apparently, some unknown employee had negligently placed the summons in the basement. Even though service of process was technically correct, the court found that to award a default judgment under such circumstances involving a large sum of money would amount to denial of due process of law. *Id.* at 242. Corporations too are entitled to due process. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984).

In framing the federal due process question for presentation to the Wyoming courts, Fluor Daniel was not required to follow any particular form of words or phrases. The procedural fairness issue was brought before the Wyoming courts with fair precision. Since the record as a whole shows by "clear intendment" that the issue was fairly presented, the issue is to be regarded as having been adequately presented. *People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S. Ct. 61, 73 L.Ed. 184 (1928). This Court has stated that: "Our jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*,

455 U.S. 104, 113-14 n. 9, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982). Thus, Fluor Daniel's appeal to fundamental fairness sufficiently alerted the trial court to Fluor Daniel's reliance on due process principles. *See Taylor v. Kentucky*, 436 U.S. 478, 482 n. 10, 98 S. Ct. 1930, 56 L.Ed.2d 468 (1978). Though at the district court level Fluor Daniel's reliance on due process principles may have been inexplicit, this reliance was within the clear intendment of the fairness issue and was therefore sufficiently presented. *See Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 598-99, 74 S. Ct. 757, 98 L.Ed. 967 (1954).

The requirement of reasonable notice goes deeper than the mere rules of civil procedure; it goes deeply into the underlying principles of due process:

> In our system of jurisprudence reasonable notice to a litigant (where there exists even the possibility of action adverse to his interests) is deemed to be of the essence of fairness and justice. Reasonable notice to parties whose interests are at stake in a contemplated order is a prerequisite to the lawful exercise of the court's power. Opportunity for a litigant to present his views as to the matters instantly before the court which may affect his rights is the very foundation stone of our procedure.

Traders Bank of Kansas City v. Cherokee Investment Co., Inc., 642 S.W.2d 122, 127 (Mo. App. 1982), *citing Hoppe, Inc. v. St. Louis Public Service Co.*, 235 S.W.2d 347 (Mo. 1951). Entry of a default judgment without actual notice "violates the instinct for fair play." *Traders Bank*, 642 S.W.2d at 127. This instinct, the instinctual craving for fairness that even children recognize, is the root of due process. This Court has held that the "question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal ques-

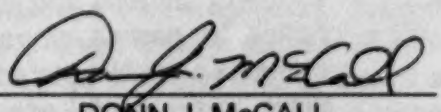
tion." *Henry v. Mississippi*, 379 U.S. 443, 447, 85 S. Ct. 564, 567, 13 L.Ed.2d 408 (1965). Thus, there can be no doubt that the federal question was preserved here.

In the case at bar, the Supreme Court of Wyoming was clearly troubled by the equities of this case, but thought it was powerless to intervene. The Wyoming courts should have abided by their instincts for fairness and given Fluor Daniel the opportunity to be heard that due process requires.

CONCLUSION

Petitioner, Fluor Daniel (NPOSR), Inc., respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the Supreme Court of Wyoming so that this Court can address the due process issues in the default judgment procedure.

Respectfully submitted,

By: 

DONN J. McCALL
Counsel of Record
Attorney for Petitioner
Brown, Drew, Massey & Sullivan
Suite 800
123 West First Street
Casper, Wyoming 82601
(307) 234-1000